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6                    IN THE UNITED STATES DISTRICT COURT  
7                    FOR THE DISTRICT OF ARIZONA  
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9        Norma Coleman and Booker Coleman,

10                                  Plaintiffs,

11        v.

12        Home Health Resources, Inc., and The  
13        Crossing: Hospice Care, Inc.,

14                                  Defendants.

**No. CV-15-01332-PHX-NVW**

**ORDER**

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16                Plaintiffs Norma and Booker Coleman sued Norma Coleman’s former joint  
17        employers, Defendants Home Health Resources, Inc. and The Crossing: Hospice Care,  
18        Inc., alleging retaliation under Title VII of the Civil Rights Act of 1964 and the Age  
19        Discrimination in Employment Act of 1967. On August 28, 2017, this Court granted  
20        summary judgment in favor of Defendants. *See generally Coleman v. Home Health Res.*  
21        *Inc.*, 269 F. Supp. 3d 935 (D. Ariz. 2017). Now before the Court are Defendants’ Motion  
22        for Award of Attorneys’ Fees (Doc. 118), the Response, and the Reply.

23        **I.        FACTUAL BACKGROUND**

24                The summary judgment order (Doc.116) states the underlying facts of the case.  
25        The Court assumes familiarity with that order but reiterates the following for ease of  
26        reference.  
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1           **A.     Pre-Litigation**

2           Plaintiff Norma Coleman (“Coleman”) is an African-American woman. She was  
3 jointly employed by Defendants Home Health Resources, Inc. and The Crossing: Hospice  
4 Care, Inc. (“Defendants”) from February 7, 2007, until July 11, 2011.

5           Coleman was first hired as their chief financial officer, which primarily involved  
6 bookkeeping. Three months later, she received a positive performance evaluation.  
7 Roughly six months after starting, she was promoted to Human Resource/Payroll  
8 Manager. Coleman’s new position carried her original bookkeeping duties but also  
9 included managerial duties in the human resources department. Her next three  
10 performance reviews were uniformly positive.

11           Coleman began to suspect she was being paid less than Defendants’ younger, non-  
12 African-American employees. She approached her supervisor in early fall of 2010 and  
13 asked for a pay raise—a request that was denied because of a supposed pay freeze. But  
14 Coleman had heard of other employees receiving raises, so she asked again and was  
15 again rejected. She received a discretionary bonus at the end of 2010.

16           Shortly after first requesting a raise, on October 15, 2010, Coleman’s supervisor  
17 issued her a “written warning for work performance,” which identified four areas  
18 “requiring immediate improvement.” Coleman failed to include complete information in  
19 personnel files, ran a backlog of work, exhibited an inappropriate attitude, and  
20 demonstrated unfamiliarity with the requirements of her job. Coleman says Defendants  
21 had a policy of providing verbal warnings before written ones, a policy not adhered to in  
22 this instance.

23           Coleman filed a Charge of Discrimination with the EEOC on November 1, 2010  
24 (the “2010 EEOC Charge”). She alleged race, gender, and age discrimination, as well as  
25 retaliation. The EEOC dismissed the Charge on October 19, 2011.

1           On November 10, 2010, without knowledge of the 2010 EEOC Charge,  
2 Defendants gave Coleman a verbal warning. But Coleman pointed to other conduct that  
3 she interpreted as retaliatory for having made the Charge:

- 4           ○ Defendants' CEO expressed "bewilderment" about the Charge and  
5 suggested, in a way that "intimidated" and "scared" Coleman, that Coleman  
6 withdraw it.
- 7           ○ On December 13, 2010, Coleman's supervisor admonished her for failing  
8 to update files in a timely fashion, which may have been someone else's  
9 fault.
- 10          ○ On May 24, 2011, Defendants gave Coleman a written warning for missing  
11 a work-related telephone hearing. Coleman was actually seven minutes  
12 late, not missing entirely.
- 13          ○ Defendants assigned Coleman to work the office reception desk on top of  
14 her other duties. She claims to have been the only managerial employee  
15 required to work at the desk.
- 16          ○ Defendants excluded Coleman from meetings relevant to her human  
17 resources work. They also excluded her from employee exit interviews,  
18 despite having previously required that she attend them.
- 19          ○ Management staff stopped greeting Coleman and "virtually refused to  
20 speak to her." Once, Coleman greeted the CEO, and she responded,  
21 "[W]hy are you still here."
- 22          ○ Defendants invited everyone except Coleman to a co-worker's office  
23 birthday party.
- 24          ○ Coleman's supervisor told employees to stop directing employee-related  
25 documents to Coleman.
- 26          ○ Coleman's May 31, 2011 performance evaluation showed a "needs  
27 improvement" rating in nine areas. She exceeded the standard in one area,  
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1 and met the standard in three others. Her supervisor refused to go over the  
2 evaluation with Coleman when Coleman asked her to do so. Coleman  
3 asked the CEO to review the evaluation with her. The CEO said she would  
4 do so upon returning from a vacation. But Coleman was terminated on July  
5 11, 2011, before any meeting ever took place.

6 Coleman filed a second Charge of Discrimination with the EEOC on September  
7 26, 2011 (the “2011 EEOC Charge”). The 2011 EEOC Charge alleged Defendants  
8 retaliated against Coleman for the 2010 EEOC Charge. On October 19, 2011, the EEOC  
9 found reasonable cause to believe Defendants retaliated against Coleman by terminating  
10 her for engaging in a protected activity. It “made no finding regarding any other  
11 allegations raised in this charge.” (Doc. 131-1, Ex. A.)

## 12 **B. Litigation**

13 Nearly four years later, on July 15, 2015, Coleman filed this action. Coleman’s  
14 original Complaint categorized itself as redressing “racial discrimination and retaliation  
15 in the workplace.” (Doc. 1 at ¶ 1.) It contained 22 paragraphs of various facts and events  
16 without differentiating what was discrimination and what was retaliation. The  
17 discrimination allegations originally included in the 2010 EEOC charges were time  
18 barred. On December 16, 2015, in response to a motion, Coleman amended her  
19 Complaint to list her husband as a co-plaintiff. (Doc. 33.) On January 19, 2016,  
20 Coleman again amended her Complaint with the same 22 paragraphs of substantive  
21 allegations as the original and first amended complaints. The only substantive difference  
22 between the 22 paragraphs of the Second Amended Complaint and the original  
23 Complaint was in the first line of the first paragraph. Instead of characterizing the  
24 complaint as alleging “racial discrimination and retaliation in the workplace,” it now  
25 characterized it as redressing only “retaliation in the workplace.” (Doc. 38.)<sup>1</sup> Thus, only

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26 <sup>1</sup> Plaintiffs also now said that “Coleman *believed* that Defendants were  
27 discriminating against her” rather than just alleging they did. (*Id.* at ¶ 10 (emphasis  
28 added).)

1 the retaliation claims, brought under Title VII of the Civil Rights Act of 1964 and the  
2 Age Discrimination in Employment Act of 1967 (“ADEA”), remained.

3 This Court granted summary judgment in favor of Defendants on August 28, 2017.  
4 (Doc. 116). It explained that Coleman’s only protected activity was filing the 2010  
5 EEOC Charge. 269 F. Supp. 3d at 941. It was not a protected activity to ask for higher  
6 pay or to challenge the truth of the pay freeze, which Coleman styled an “informal  
7 complaint,” because she “pointed to nothing in the record here indicating she even hinted  
8 at discrimination on the basis of any status protected under Title VII or the ADEA.” *Id.*  
9 at 941-42. Next, the Court analyzed which of Defendant’s actions could be construed as  
10 adverse employment actions—non-trivial actions that would deter reasonable employees  
11 from making Title VII complaints. It concluded that only the termination and negative  
12 performance reviews and admonishments (the December 13, 2010 admonishment, the  
13 May 24, 2011 written warning, and the May 31, 2011 performance evaluation) qualified.  
14 *Id.* at 943. All other claims failed either because they reflected mere ostracism, lacked  
15 evidentiary support, or were otherwise too trivial to deter a reasonable employee as a  
16 matter of law. *Id.* at 943-45.

17 Next, the Court found that there was no prima facie causal link between  
18 Coleman’s discharge and her 2010 EEOC Complaint because there was an eight-month  
19 gap between the Complaint and her termination. *Id.* at 945. With only the performance  
20 reviews and admonishments remaining, the Court determined that Defendants  
21 indisputably had a legitimate, non-retaliatory rationale: Coleman “was not able to meet  
22 the demands of the job.” *Id.* at 946. In addition to various specific instances, pre- and  
23 postdating her 2010 EEOC Complaint, Defendants had an independent, outside  
24 consultant “who identified at least twelve significant deficiencies in Coleman’s job  
25 performance that could expose Defendants to liability and advised them to hire a ‘human  
26 resources professional’ to take over.” *Id.* Consequently, as recommended by the  
27 independent consultant, Defendants eliminated Coleman’s position entirely “and brought  
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1 in a number of outside groups to run the department before settling on someone  
2 satisfactory.” *Id.* Finally, the Court found no genuine dispute that the proffered rational  
3 was non-pretextual: Coleman received good performance reviews until Defendants  
4 discovered the undisputed deficiencies in her work. *Id.* at 947. “Overpromotion, if that’s  
5 what it was, does not vest an employee with a Title VII or ADEA right to tenure after the  
6 employer discovers its mistake and takes action to get the job done.” *Id.*

### 7 **C. This Motion**

8 Defendants now move for fees on three bases. First, they seek fees against  
9 Plaintiffs under Title VII and the ADEA. Second, they seek fees against Plaintiffs’  
10 counsel personally under 28 U.S.C. § 1927. Finally, they seek fees relating to this  
11 Court’s order awarding attorneys’ fees during discovery pursuant to Federal Rule of Civil  
12 Procedure 37(a)(5). (Doc. 68.) In total, they “seek an award of approximately  
13 \$130,000.” (Doc. 118 at 2.)

## 14 **II. FEES UNDER TITLE VII AND ADEA**

### 15 **A. Legal Standards**

16 Defendants seek fees under both Title VII and the ADEA. They contend  
17 Plaintiffs’ claims were completely meritless. For the following reasons, the Court will  
18 consider awarding fees in this case only under Title VII and only in a partial amount.

#### 19 **1. Attorneys’ Fees Under Title VII**

20 Title VII contains an attorney’s fees provision. In any action brought under the  
21 statute, “the court, in its discretion, may allow the prevailing party . . . a reasonable  
22 attorney’s fee (including expert fees) as part of the costs.” 42 U.S.C. § 2000e-5(k).

23 Civil rights law must strike a balance between chilling legitimate actions on the  
24 one hand and indulging unfounded accusations on the other. *Blue v. Dep’t of Army*, 914  
25 F.2d 525, 535 (4th Cir. 1990). Consequently, it is much more difficult for prevailing  
26 defendants to recover fees in Title VII cases than it is for prevailing plaintiffs. *CRST Van*  
27 *Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1654 (2016) (Thomas, J., concurring) (noting  
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1 the asymmetry). Defendants may recover attorneys' fees only "upon a finding that the  
2 plaintiff's action was frivolous, unreasonable, or without foundation, even though not  
3 brought in subjective bad faith." *Christianburg Garment Co. v. EEOC*, 434 U.S. 412,  
4 421 (1978).

5 Thus, there are three bases for assessing fees against a plaintiff in Title VII action:  
6 frivolity, unreasonableness, or lack of foundation. "Without foundation" is nebulous and  
7 begets the very post hoc fallacy the Court warned against. *See id.* at 421-22 ("[I]t is  
8 important that a district court resist the understandable temptation to engage in post hoc  
9 reasoning by concluding that, because a plaintiff did not ultimately prevail, his action  
10 must have been unreasonable or without foundation."). But "frivolous" and  
11 "unreasonable" are both terms of art in the law. "Frivolous" means "[l]acking a legal  
12 basis or legal merit; not serious; not reasonably purposeful." Black's Law Dictionary 692  
13 (8th ed. 1999). "Unreasonable" means "[n]ot guided by reason; irrational or capricious."  
14 *Id.* at 1574. "Courts should therefore ask whether the action was irrational, capricious,  
15 not guided by reason, not serious, or not reasonably purposeful." *Watson v. Cty. of*  
16 *Yavapai*, 240 F. Supp. 3d 996, 1000 (D. Ariz. 2017). Of course, "if a plaintiff is found to  
17 have brought or continued such a claim in *bad faith*, there will be an even stronger basis  
18 for charging him with the attorney's fees incurred by the defense." *Christianburg*, 434  
19 U.S. at 422 (emphasis in original).

## 20 **2. Attorneys' Fees Under the ADEA**

21 The "ADEA does not provide attorney's fees to a prevailing defendant." *Hoover*  
22 *v. Armco, Inc.*, 915 F.2d 355, 357 (8th Cir. 1990). Nevertheless, in certain ADEA cases,  
23 some courts have looked to an exception to the general American rule that the prevailing  
24 party may not recover attorneys' fees. *See, e.g., id.* at 356-57 (citing *Alyeska Pipeline*  
25 *Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59 (1975)); *Glass v. Intel Corp., Inc.*,  
26 No. CV-07-1835-PHX-MHM, 2010 WL 11515224, at \*2 (D. Ariz Feb. 9, 2010) (same).  
27 In *Alyeska Pipeline*, the Supreme Court noted that the federal courts have the inherent  
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1 power, unless expressly forbidden by Congress, to sanction a losing party who “has acted  
2 in bad faith, vexatiously, wantonly, or for oppressive reasons.” 421 U.S. at 258-59  
3 (internal quotation marks omitted). But there the Court also explained that the American  
4 rule “is deeply rooted in our history and in congressional policy.” *Id.* at 271.

5 In *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), the Court cautioned that  
6 “[b]ecause of their very potency, inherent powers must be exercised with restraint and  
7 discretion.” *Id.* at 44. As the Ninth Circuit has clarified, imposing sanctions under the  
8 inherent power when a litigant has a colorable claim requires a finding that the “litigant is  
9 substantially motivated by vindictiveness, obduracy, or mala fides.” *B.K.B. v. Maui*  
10 *Police Dep’t*, 276 F.3d 1091, 1108 (9th Cir. 2002) (quoting *Fink v. Gomez*, 239 F.3d 989,  
11 992 (9th Cir. 2001)).

12 Defendants urge the Court to use its inherent power to award fees under the  
13 ADEA. (Doc. 118 at 2, 9-10.) This case does not call for the extraordinary departure  
14 from the American rule that occurs when a court uses its inherent powers. The facts of  
15 this case do not match the facts of cases where other courts have used the inherent power  
16 to sanction.

17 Defendants seek fees for the same reasons under Title VII and the ADEA. Fees  
18 are sometimes available, as explained, for prevailing defendants under Title VII. As  
19 discussed below, Plaintiffs unreasonably pressed their claim past discovery. But the  
20 evidence of intense bad faith is not persuasive. The analysis that follows will therefore  
21 rely only on fee shifting under Title VII.

## 22 **B. Analysis**

23 Defendants believe they should be awarded fees for two reasons. First, Coleman  
24 supposedly lied to them and failed to amend her Complaint to remove her time-barred  
25 claims, as she stipulated she would. Second, Coleman’s claims were frivolous and  
26 unreasonable.



1                   **1.     Although it was unclear whether Coleman dismissed her time-**  
2                   **barred claims, the demands of the statute are too stringent to**  
3                   **award fees on that basis.**

4                   Coleman’s original Complaint asserted claims of discrimination. (Doc. 1.)  
5 Defendants contend that the discrimination claims were time barred by failure to file an  
6 action after the first EEOC charge. Plaintiffs do not dispute this.

7                   During the scheduling conference on October 27, 2015, Defendants announced  
8 they intended to move to dismiss all claims except those based on retaliation. (Doc. 29 at  
9 5.) Coleman admitted that her “primary cause of action is one of retaliation . . . .” (*Id.*)  
10 She did not “really have a good harassment claim in the first place.” (*Id.*) Accordingly,  
11 on November 12, 2015, Defendants’ counsel sent Plaintiffs’ counsel a message asserting  
12 that the discrimination claims were time barred and that alleging them violated Rule 11.  
13 (Doc. 118-4, Ex K.) Plaintiffs’ counsel responded on November 20, 2015, stipulating “to  
14 the dismissal of all claims, except those Title VII claims predicated” on the 2011 EEOC  
15 Charge, which was solely for retaliation. (Doc. 82-2, Ex. B.) Defendants say they relied  
16 on Plaintiffs’ counsel and stipulated to allowing Coleman to amend her Complaint. (Doc.  
17 118 at 6.)

18                   The Second Amended Complaint states in its first few words, “This is an action  
19 seeking to redress retaliation in the workplace . . . .” (Doc. 38 at ¶ 1.) The original  
20 Complaint, by contrast, began, “This is an action seeking to redress *racial discrimination*  
21 and retaliation in the workplace . . . .” (Doc. 1 at ¶ 1 (emphasis added).) Yet as noted  
22 above, all the substantive allegations in the Second Amended Complaint are the same as  
23 those in the original Complaint. No facts were dropped out.

24                   Nevertheless, few if any specific facts relating to discrimination were ever alleged  
25 in the Complaints.<sup>2</sup> The Complaints claimed only that Defendants had lied about the pay

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26                   <sup>2</sup> Coleman had alleged specific facts elsewhere: the 2010 EEOC charge alleged her  
27 younger, male, non-African-American subordinate was paid more than she was. (Doc.  
28 38-1, Ex. A.)

1 freeze and that Defendants paid Coleman less, or Coleman believed they paid her less,  
2 than her younger, male, non-African-American colleagues. By contrast, the Complaints  
3 listed specific examples of retaliation: “Defendants subjected Ms. Coleman to a series of  
4 undeserved disciplinary reprimands, gave her an inaccurate, unfair, negative performance  
5 evaluation, assigned her a series of clerical tasks unrelated to her duties as Human  
6 Resource Manager, and excluded her from company meetings that were in the area of  
7 human resources and Ms. Coleman’s expertise.” (Doc. 1 at ¶ 16; Doc. 38 at ¶ 17.)

8 On summary judgment Defendants argued that Plaintiffs had alleged time-barred  
9 claims of discrimination.<sup>3</sup> In light of the fully repeated substantive allegations and the  
10 vagueness of what allegations related to what statute in the catch-all, one-count pleading,  
11 Defendants were justified in thinking Plaintiffs were reasserting the time-barred claims.  
12 Plaintiffs should have submitted a stipulation to partially dismiss or unilaterally  
13 dismissed partially under Rule 41. But Defendants could have submitted a stipulation as  
14 well or inquired again before briefing the time-barred claims on summary judgment. The  
15 greater fault lies with Plaintiffs, whose conduct did not comport with customary candor.  
16 But the Court finds no example of similar conduct and vagueness in which fees were  
17 awarded. In light of the extremely stringent demands of the statute, the Court cannot  
18 conclude they are met here.

19 **2. Plaintiffs should have known most of their action was meritless**  
20 **by the close of discovery, and Defendants are therefore entitled**  
21 **to attorneys’ fees for work performed in moving for summary**  
22 **judgment on the frivolous claims.**

23 At the threshold, Coleman’s non-discharge retaliation claims, though weak,  
24 required analysis and comparison to precedents. Defendants’ Motion does not address

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25 <sup>3</sup> Defendants incorrectly claimed in their Motion for Summary Judgment that  
26 Coleman continued “to assert a claim under 42 U.S.C. § 1981.” (Doc. 82 at 10.) The  
27 Second Amended Complaint dropped the § 1981 cause of action, which was not  
28 separately pled (nothing was separately pled) but identified only by statutory citation in  
the second paragraph.

1 them specifically. They were not frivolous, and attorneys' fees cannot be awarded based  
2 on those claims.

3 The claim of retaliation by discharge may not have been frivolous and  
4 unreasonable at the outset, but it emerged to be so after discovery closed.

5 Despite the ultimate weakness of her case, Coleman did have an EEOC finding of  
6 reasonable cause to believe Defendants had retaliated against her for engaging in a  
7 protected activity. This EEOC finding is probative, especially at the start of the case.  
8 *See Plummer v. W. Int'l Hotels Co., Inc.*, 656 F.2d 502, 505 (9th Cir. 1981). The EEOC  
9 determination regarding Coleman's retaliation claim covered both Title VII and the  
10 ADEA. (Doc. 131-1, Ex. A ("I have considered all the evidence obtained during the  
11 investigation and find there is reasonable cause to believe Respondent retaliated against  
12 Charging Party in violation of Title VII and the ADEA . . .").) Defendants therefore go  
13 too far in asserting that Plaintiffs had no basis from the beginning to file this action.

14 However, Coleman should have known after the close of discovery that her case  
15 for retaliatory discharge was no longer rational, serious, or guided by reason. *Watson*,  
16 240 F. Supp. 3d at 1000. *See also id.* at 1002 ("[C]ontinuing to litigate after discovery  
17 turns up nothing may render an action unreasonable from that point forward."). As the  
18 Court explained in its Summary Judgment Order, Defendants "brought in an independent,  
19 outside consultant to assess the state of the Human Resources department. The  
20 consultant identified at least twelve significant deficiencies in Coleman's job  
21 performance that could expose Defendants to liability and advised them to hire a 'human  
22 resources professional' to take over." *Id.* at 946 (internal citation omitted). Plaintiffs  
23 offered no basis to believe that this finding was pretextual or that the auditor was biased.  
24 (Indeed, Plaintiffs failed to depose the auditor. (Doc. 118 at 7 n.3.)) Defendants adopted  
25 the auditor's plan, outsourcing Coleman's position and cycling through "a number of  
26 different outside groups before settling on someone satisfactory." 269 F. Supp. 3d at 946.  
27 Plaintiffs also pointed to no evidence that the deficiencies in Coleman's performance  
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1 were manufactured or inaccurate. *Id.* at 947. There was simply no genuine dispute that  
2 Coleman was not adequately performing her job and that Defendants received and relied  
3 on independent, non-biased expert advice to terminate the position and outsource the  
4 work. *Id.*

5 In short, Defendants’ reasons to terminate Coleman and outsource the job were  
6 unquestionably legitimate, non-discriminatory, and true. Plaintiffs presented no colorable  
7 basis of pretext. As a result, it was objectively unreasonable for Plaintiffs to continue to  
8 press the question of retaliatory discharge into the summary judgment stage.

9 Therefore, Defendants are entitled to an award of attorneys’ fees incurred in  
10 pursuing summary judgment on the discharge claim but not on the non-discharge  
11 retaliation claims. *Fox v. Vice*, 563 U.S. 826, 829 (2011) (holding that, when a plaintiff  
12 asserts “both frivolous and non-frivolous claims,” a court may grant fees “only for the  
13 costs that the defendant would not have incurred but for the frivolous claims”).

14 The Court reviewed Defendants’ attorneys’ fees sustained from September 19,  
15 2016, the date on which their attorneys began work on the Motion for Summary  
16 Judgment. By the Court’s calculation, Defendants were actually billed for 124.9 hours, at  
17 various rates, in preparation for summary judgment. (This excludes hours related to the  
18 oral argument. Those hours are discussed below.) The Court disregarded the few entries,  
19 added after September 19, 2016, for discovery disputes preceding the motion for  
20 summary judgment. It also disregarded the spoliation research conducted on October 6,  
21 2016, because it is not clear whether this research tied into the summary judgment  
22 argument on damages.

23 Defendants state that they spent 5.6 hours, billed at John Doran’s rate of  
24 \$545/hour, on the portion of the summary judgment motion addressing the time-barred  
25 claims. (Doc. 118 at 12 n.5; Doc. 123-4, Ex. I.) The Court will allow those fees. As  
26 explained, Plaintiffs’ poorly amended Complaint was not an independent ground to  
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1 assess fees. It was, however, reasonable and necessary to address the potentially extant  
2 time-barred claims on summary judgment.

3 All told, the facially allowable fees related to summary judgment come to  
4 \$54,621. But one thorn remains: it is impossible to discern from Defendants' counsel's  
5 billing logs how work on summary judgment was divided between the frivolous and non-  
6 frivolous claims. The Court can grant only the fees caused solely by the frivolous claims.  
7 *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1189 (2017) ("A sanctioning  
8 court must determine which fees were incurred because of, and solely because of, the  
9 misconduct at issue."). The "essential goal in shifting fees is to do rough justice, not to  
10 achieve auditing perfection." *Id.* at 1187 (quoting *Fox*, 563 U.S. at 838) (internal  
11 quotation marks omitted). "Accordingly, a district court may take into account [its]  
12 overall sense of a suit, and may use estimates in calculating and allocating an attorney's  
13 time." *Id.* (internal quotation marks omitted) (modification in original).

14 The aspects of claimed retaliation that were not revealed to be clearly groundless  
15 upon completion of discovery were not weighty. It is not feasible to break down those  
16 services time entry by time entry. Rather, the Court will err in favor of caution by  
17 reducing the awarded fees by more than enough to take account of non-frivolous claims  
18 of retaliation. A 20% reduction of the fees incurred on summary judgment will assure  
19 that the fee award reaches only the fees incurred on summary judgment concerning the  
20 retaliation claim that was by then shown to be groundless and unreasonable. Fees will be  
21 awarded pursuant to Title VII in the amount of \$43,700.00, plus a reduced amount of  
22 \$6,925.00 for oral argument on the motion for summary judgment as discussed below.

23 **3. Once excessive billing for oral argument is subtracted, the fee**  
24 **award is reasonable.**

25 Local Rule 54.2(c)(3) sets forth the factors the Court considers in evaluating the  
26 reasonableness of the requested attorneys' fees award. These include, but are not limited  
27 to, (A) the "time and labor required of counsel," (B) the "novelty and difficulty of the  
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1 questions presented,” (C) the “skill requisite to perform the legal service properly,”  
2 (D) the “preclusion of other employment by counsel because of the acceptance of the  
3 action,” (E) the “customary fee charged in matters of the type involved,” (F) whether the  
4 fee is fixed or contingent, (G) any “time limitations imposed by the client or the  
5 circumstances,” (H) the “amount of money, or the value of the rights, involved, and the  
6 results obtained,” (I) the “experience, reputation and ability of counsel,” (J) the case’s  
7 “undesirability,” (K) the “nature and length of the professional relationship between the  
8 attorney and the client,” (L) awards “in similar actions,” and (M) any “other matters  
9 deemed appropriate under the circumstances.”

10 Plaintiffs say it is “shocking” how much time Defendants’ attorneys spent on this  
11 case. (Doc. 131 at 6.) They argue defense counsels’ time sheets show over-staffing and  
12 over-billing, but they fail to point to specific examples. (*Id.* at 7.) This failure violates  
13 Local Rule 54.2(f), which requires the response in opposition to “identify with specificity  
14 . . . each and every disputed time entry or expense item.” Plaintiffs’ “objection,” such as  
15 it is, is rejected. In any event, Defendants explain that one attorney was on extended  
16 leave during part of the case, and the other attorneys performed distinct and separate  
17 tasks. (Doc. 132 at 10.)

18 Plaintiffs’ single concrete, well-taken objection is that Defense counsel spent a  
19 total of 33.5 hours preparing for and attending oral argument on Defendants’ summary  
20 judgment motion. (Doc. 131 at 7.) The Court agrees this was an excessive number of  
21 hours. In its discretion, the Court will reduce the total number of oral-argument-  
22 preparation hours to be charged to Plaintiffs to 15. Ten of these hours will be at Doran’s  
23 rate of \$545/hour (\$5,450 total), as Doran was the lead attorney who ultimately argued  
24 the case. The remaining five hours will be split between Lindsay Hesketh (\$315/hour)  
25 and Lori Keffer (\$265/hour). Hesketh actually billed 13.6 hours related to the oral  
26 argument, and Keffer billed 6.3. Accordingly the Court will allow three hours billed at  
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1 Hesketh's rate (\$945 total) and two hours billed at Keffer's (\$530 total). In sum,  
2 Defendants are entitled to \$6,925 for fees related to the oral argument.

3 Thus, Defendants will be awarded \$43,700.00 for fees related to summary  
4 judgment and \$6,925.00 for fees related to oral argument on the motion, for a total of  
5 \$50,625.00

6 This award comports with the requirements of Local Rule 54.2(c)(3). The time  
7 required has been adjusted to be reasonable and to reflect the difficulty of the case and  
8 the skill required. The rates are not excessive given the levels of experience of the  
9 attorneys involved. Finally, the award is comparable to awards to defendants in similar  
10 civil rights cases. *See, e.g., Russell v. Mountain Park Health Ctr. Props., LLC*, No. CV  
11 07-00875-PHX-NVW, 2012 WL 369576 (D. Ariz. Feb. 6, 2012) (\$50,000, the amount  
12 requested); *Johnnie v. Target Corp.*, No. CV 06-00826-PHX-MHB (D. Ariz. Mar. 31,  
13 2008) (\$114,588).

### 14 **III. FEES UNDER 28 U.S.C. § 1927**

#### 15 **A. Legal Standard**

16 28 U.S.C. § 1927 provides, "Any attorney . . . who so multiplies the proceedings  
17 in any case unreasonably and vexatiously may be required by the court to satisfy  
18 personally the excess costs, expenses, and attorneys' fees reasonably incurred because of  
19 such conduct." "Sanctions pursuant to section 1927 must be supported by a finding of  
20 subjective bad faith." *New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1306 (9th  
21 Cir. 1989). "Bad faith is present when an attorney knowingly or recklessly raises a  
22 frivolous argument or argues a meritorious claim for the purpose of harassing an  
23 opponent. Tactics undertaken with the intent to increase expenses may also support a  
24 finding of bad faith." *Id.* (internal quotation marks and citations omitted). The district  
25 court must make a specific finding of subjective bad faith; negligence is not enough.  
26 *MGIC Indem. Corp v. Moore*, 952 F.2d 1120, 1122 (9th Cir. 1991). Thus, for his  
27 behavior to be sanctionable under § 1927, an attorney must knowingly engage in  
28

1 vexatious dilatory conduct, or he must demonstrate recklessness so severe that it  
2 necessarily implies subjective bad faith.

3 **B. Analysis**

4 Defendants seek fees from Plaintiffs' counsel for asserting time-barred claims.  
5 They say this violated of Rule 11, especially when he continued to assert them. (Doc.  
6 118 at 10-11.) Defendants do not present persuasive evidence that Plaintiffs' counsel  
7 filed the Complaints with a vexatious, dilatory purpose or in subjective bad faith.

8 Defendants also take issue with Plaintiffs' counsel supposedly shifting around the  
9 time of the parties' mediation in bad faith. Plaintiffs originally chose a mediator but,  
10 according to Plaintiffs, changed their mind and "ultimately concluded that [the  
11 mediator's] retainer fee" was unreasonable. (Doc. 131 at 5.) Defendants assert this is a  
12 lie, as the mutually-agreed-upon replacement mediator charged similar fees. (Doc. 132 at  
13 6-7.) No evidence is before the Court to assess this assertion. The parties both point to  
14 the courtesies they refused to extend each other, including not scheduling Coleman's  
15 deposition when she would already have been in Phoenix for the mediation. (Doc. 131 at  
16 5.) The mediation was canceled because the Court ordered Defendants' CEO to be  
17 present, and the CEO was out of the country. (Doc. 132 at 7.) Defendants make the  
18 muddled, unsupported claim that Plaintiffs' counsel "continued to drag his feet on  
19 mediation scheduling," causing Defendants to give up. (*Id.*) Again, Defendants do not  
20 provide enough to prove Plaintiffs' counsel acted with a vexatious, dilatory purpose or to  
21 allow the Court to infer subjective bad faith.

22 Defendants provide a list of Plaintiffs' counsel's failure to conform to deadlines  
23 and requests for extensions in various other matters. (*Id.* at 8-9.) To the trivial extent the  
24 list is relevant, it does not demonstrate vexatious conduct or bad faith. Negligence is not  
25 enough for § 1927 sanctions. *MGIC Indem. Corp.*, 952 F.2d at 1122.

26 Finally, Defendants and Plaintiffs both present the Court with email exchanges  
27 that cast the other side in an unfavorable light. Defendants contend these emails  
28



1 demonstrate “a vexatious personal animus.” (Doc. 118 at 12.) Plaintiffs themselves  
2 claim the “facts warrant fees” against defense counsel. (Doc. 131 at 6.) Neither side  
3 emerges from these exchanges looking good. As explained above, Plaintiffs’ counsel did  
4 not engage in sanctionable conduct, and rude emails are not a basis for sanctions. The  
5 Court admonishes Mr. Montoya for his grave breaches of professionalism and civility.  
6 (See Doc. 118-4, Ex. J; Doc. 131-1, Exs. E, F.) But it cannot award sanctions under 28  
7 U.S.C. § 1927.

#### 8 **IV. FEES UNDER FEDERAL RULE OF CIVIL PROCEDURE 37**

##### 9 **A. Legal Standard**

10 A party may move for an order compelling discovery after a good-faith conference  
11 with the party failing to disclose. Fed. R. Civ. P. 37(a)(1). If the motion is granted, “the  
12 court must, after giving an opportunity to be heard, require the party or deponent whose  
13 conduct necessitated the motion, the party or attorney advising that conduct, or both to  
14 pay the movant’s reasonable expenses incurred in making the motion, including  
15 attorney’s fees.” Fed. R. Civ. P. 37(a)(5).

##### 16 **B. Analysis**

17 After complying with Rule 37(a)(1), Defendants filed a Discovery Motion. (Doc.  
18 68.) Plaintiffs responded, and the Court granted the motion. (Doc. 78.) The dispute  
19 centered on Plaintiffs responding to Defendants’ discovery requests by repeatedly  
20 pointing them to 721 undifferentiated documents. The Court concluded that Plaintiffs’  
21 failure to specify which documents were responsive to which request was not  
22 substantially justified. (*Id.* at 1, 2.) It noted in its Order that attorneys’ fees incurred in  
23 connection with Defendants’ motion would “be awarded against Plaintiffs in an amount  
24 to be quantified at the conclusion of this case.” (*Id.* at 2.) The case having concluded,  
25 Defendants now seek \$3,840. Their attorneys spent 10.8 hours, billed at various rates, on  
26 the discovery dispute. (Doc. 123-3, Ex. D.)

1 Plaintiff misreads the itemized fee statement, contending that “Defendants’  
2 counsel claims that they spent over ten hours organizing documents Ms. Coleman  
3 produced.” (Doc. 131 at 6.) It is true that Defendants claim Plaintiffs failed to comply  
4 with the Court’s order and that they had to sort through the documents themselves. (Doc.  
5 118 at 13.) But they specifically note that the \$3,840 “does not include any fees  
6 associated with sorting Plaintiffs’ document dump after Plaintiffs failed to follow this  
7 Court’s Order.” (*Id.*) A review of their itemized statement confirms Defendants are  
8 correct.


9 Defendants are entitled to what they request. The Court noted in its discovery  
10 order that all of Defendants’ claims would be well founded if they had not been mooted  
11 by Plaintiffs’ Response. (Doc. 78.) Defendants should not have needed their attorneys to  
12 put the work into the motion in the first place, and they will be awarded the \$3,840 in  
13 fees that went into it.

14 IT IS THEREFORE ORDERED that Defendants’ request for award of attorney’s  
15 fees on its discovery motion is granted in the amount of \$3,840.00.

16 IT IS FURTHER ORDERED that Defendants’ Motion for Attorneys’ Fees (Doc.  
17 118) is granted in the additional amount of \$50,625.00.

18 IT IS FURTHER ORDERED that the Clerk of the Court enter judgment in favor  
19 of Defendants Home Health Resources, Inc. and The Crossing: Hospice Care, Inc. against  
20 Plaintiffs Norma Coleman and Booker Coleman, jointly and severally, in the amount of  
21 \$54,465.00 plus interest at the federal rate of 2.24% per annum from the date of judgment  
22 until paid.

23 Dated: May 11, 2018.

24  
25   
26 \_\_\_\_\_  
27 Neil V. Wake  
28 Senior United States District Judge